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Salem ak Brayon v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(M)-532–10 OF 2018
LEE SWEE SENG, SUPANG LIAN AND GUNALAN MUNIANDY JJCA
8 DECEMBER 2022

C *Criminal Law — Murder — Intention to kill — Whether trial judge rightly found from facts and circumstantial evidence that accused intended to kill deceased — Whether testimony of eye-witness who saw accused assaulting the deceased and evidence of pathologist who autopsied deceased's body negated accused's version of events — Whether 'last seen together' theory applied to require cogent explanation* D *from accused as to the fatal injuries suffered by deceased to rebut presumption that he caused them — Whether accused's defence was a bare denial that failed to raise reasonable doubt in prosecution's case*

The appellant was sentenced to death after the High Court found him guilty of E murdering his then 32-year-old girlfriend ('the deceased'). The prosecution's prime witness, PW17, told the trial court that she was with the deceased in the latter's rented room on the evening of 27 November 2016, when around 8pm, the appellant came to the room and demanded to know from the deceased why she was not answering his text messages and whether she was 'seeing other men F behind his back'. Initially, the deceased kept silent, but when she finally admitted that she was having a relationship with another man, the appellant went into a rage and began assaulting the deceased relentlessly for up to an hour. PW17 said she tried to stop the assault, but in vain. She said the appellant continued to slap, kick and throw the deceased around the room. In the G process, the deceased's head slammed against the concrete wall. PW17 said after the appellant had cooled down, she left the room and went back to her own place. The following morning, PW17 was informed by the appellant that the deceased had died. The pathologist, PW10, who carried out the post-mortem on the deceased testified that although there were multiple H assault injuries all over the body, a head injury caused by blunt trauma was the cause of death. PW10 had visited the scene of the crime and opined that the head injury was most probably caused when the deceased's head slammed against the concrete wall. In his defence to the charge of murder, the appellant admitted that although he had assaulted the deceased, he never intended to kill I her and that the deceased's head had only banged against a soft calcium-board wall and not a concrete wall. The trial judge rejected that proposition, given the injuries the deceased had suffered, and ruled that the defence was merely a bare denial that failed to raise any reasonable doubt in the prosecution's case. The appellant appealed against his conviction and sentence.

Held, unanimously dismissing the appeal and affirming the conviction and sentence: A

(1) The thrust of the appellant's defence was that he did not intend to kill the deceased or to cause her any fatal injuries. It was trite law that intention was provable by recourse to circumstantial evidence and inferences from surrounding circumstances and the acts or conduct of the person who caused the injuries. A person would be deemed to intend the natural consequences of his acts. From the 'violent, relentless and aggressive assault' and numerous injuries the deceased had suffered, as supported by the testimonies of PW10 and PW17, the trial court came to the irresistible inference that the appellant intended to kill the deceased. The trial judge also inferred from the facts and circumstances that the motive for the killing was the appellant's intense jealousy over the deceased's relationship with another man behind his back (see paras 22, 28, 30–31, 33, 45 & 47). B C D

(2) The trial judge gave due emphasis and weight to the uncontradicted evidence of PW17 who testified that she saw the appellant hitting the deceased aggressively and relentlessly and also saw the appellant pushing the deceased to the wall. PW17's evidence was corroborated by PW10's finding that the cause of death was the head injury due to blunt force trauma. From his visit to the crime scene, PW10 opined that the concrete wall could be the blunt and hard object that caused the said injury — and that evidence negated the appellant's contention that the deceased's head had only collided with a soft calcium board wall. As contended by the respondent, the material facts relating to the incident were never challenged by the appellant. There was no intervening cause after the attack by the appellant prior to the deceased being discovered dead (see paras 40–43). E F

(3) The 'last seen together' doctrine supported the trial judge's finding that the appellant had failed to proffer an explanation for the injuries, including the head injury, suffered by the deceased that led to her death. PW17, whom the trial judge found to be credible and truthful, testified that the appellant was with the deceased when she left the scene after the commotion had stopped. Another witness, PW14, testified that she saw the appellant leave the deceased's room around 10.20pm. Under the circumstances, the 'last seen together' theory applied and the burden shifted to the appellant to proffer a strong and cogent explanation to rebut the presumption that his actions had caused the deceased's death. The absence of such explanation was detrimental to the defence (see paras 51–52 & 54). G H I

(4) The trial judge found the appellant's version of events to be no more than a bare denial that was incapable of raising a reasonable doubt in the prosecution's case. In coming to that finding, the trial judge gave due

weight to the fact that the defence never raised the issue that the deceased's head actually banged against a soft calcium-board wall during the prosecution's case. This issue was only raised when the defence was called. This jeopardised the appellant's credibility as this important line of defence was never put to any of the prosecution's witnesses (see paras 55 & 57).

(5) The appellant's defence was essentially an afterthought and a bare denial devoid of any credibility. The decision and findings made by the trial judge at the conclusion of the trial were not plainly wrong (see paras 56 & 59).

[Bahasa Malaysia summary

Perayu telah dijatuhkan hukuman mati selepas Mahkamah Tinggi mendapati beliau bersalah membunuh teman wanitanya yang ketika itu berusia 32 tahun ('si mati'). Saksi utama pendakwaan, PW17, memberitahu mahkamah perbicaraan bahawa beliau bersama si mati di bilik sewa si mati pada petang 27 November 2016, apabila kira-kira jam 8 malam, perayu datang ke bilik tersebut dan mendesak si mati mengapa beliau tidak menjawab mesej teksnya dan sama ada beliau 'menemui lelaki lain di belakangnya'. Pada mulanya, si mati mendiamkan diri, tetapi apabila beliau akhirnya mengaku menjalinkan hubungan dengan lelaki lain, perayu mengamuk dan mula menyerang si mati tanpa henti sehingga sejam. PW17 berkata beliau cuba menghentikan serangan tersebut, tetapi sia-sia. Beliau berkata perayu terus menampar, menendang dan membaling si mati di sekeliling bilik. Dalam kejadia tersebut, kepala si mati terhempas ke dinding konkrit. PW17 berkata selepas perayu bertenang, beliau keluar dari bilik dan pulang ke tempatnya sendiri. Keesokan paginya, PW17 dimaklumkan oleh perayu bahawa si mati telah meninggal dunia. Pakar patologi, PW10, yang menjalankan bedah siasat ke atas si mati memberi keterangan bahawa walaupun terdapat beberapa kecederaan serangan di seluruh badan, kecederaan kepala akibat trauma tumpul adalah punca kematian. PW10 telah melawat tempat kejadian dan berpendapat kecederaan kepala berkemungkinan besar berpunca apabila kepala si mati terhantuk ke dinding konkrit. Dalam pembelaannya terhadap pertuduhan membunuh, perayu mengakui bahawa walaupun beliau telah menyerang si mati, beliau tidak pernah berniat untuk membunuhnya dan bahawa kepala si mati hanya terhantuk pada dinding papan kalsium lembut dan bukannya dinding konkrit. Hakim bicara menolak cadangan tersebut, memandangkan kecederaan yang dialami si mati, dan memutuskan bahawa pembelaan tersebut hanyalah penafian kosong yang gagal menimbulkan sebarang keraguan munasabah dalam kes pendakwaan. Perayu merayu terhadap sabitan dan hukumannya.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Teras pembelaan perayu adalah bahawa beliau tidak berniat untuk

membunuh si mati atau menyebabkan beliau mengalami sebarang kecederaan maut. Sudah menjadi undang-undang yang mantap bahawa niat boleh dibuktikan dengan menggunakan keterangan mengikut keadaan dan kesimpulan daripada keadaan sekeliling dan perbuatan atau kelakuan orang yang menyebabkan kecederaan. Seseorang akan dianggap berniat akibat semula jadi dari perbuatannya. Daripada 'serangan ganas, tanpa henti dan agresif' serta banyak kecederaan yang dialami si mati, seperti yang disokong oleh keterangan PW10 dan PW17, mahkamah perbicaraan membuat kesimpulan yang tidak dapat disangkal bahawa perayu berniat untuk membunuh si mati. Hakim bicara juga menyimpulkan daripada fakta dan keadaan bahawa motif pembunuhan adalah perasaan cemburu yang amat mendalam perayu terhadap hubungan si mati dengan lelaki lain di belakangnya (lihat perenggan 22, 28, 30–31, 33, 45 & 47).

(2) Hakim bicara memberi penekanan dan berat yang sewajarnya kepada keterangan tidak bercanggah PW17 yang memberi keterangan bahawa beliau melihat perayu memukul si mati secara agresif dan tidak henti-henti dan juga melihat perayu menolak si mati ke dinding. Keterangan PW17 disokong oleh dapatan PW10 bahawa punca kematian adalah kecederaan kepala akibat trauma pukulan tumpul. Daripada lawatannya ke tempat kejadian, PW10 berpendapat bahawa dinding konkrit tersebut boleh menjadi objek tumpul dan keras yang menyebabkan kecederaan tersebut — dan keterangan tersebut menafikan dakwaan perayu bahawa kepala si mati hanya terlanggar dinding papan kalsium lembut. Seperti yang dipertikaikan oleh responden, fakta material yang berkaitan dengan kejadian tersebut tidak pernah dicabar oleh perayu. Tiada sebab yang menghalang selepas serangan oleh perayu sebelum si mati ditemui mati (lihat perenggan 40–43).

(3) Doktrin 'terakhir dilihat bersama' menyokong dapatan hakim bicara bahawa perayu telah gagal memberikan penjelasan bagi kecederaan, termasuk kecederaan kepala, yang dialami oleh si mati yang membawa kepada kematiannya. PW17, yang didapati oleh hakim bicara boleh dipercayai dan jujur, memberi keterangan bahawa perayu berada bersama si mati ketika beliau meninggalkan tempat kejadian selepas kekecohan berhenti. Seorang lagi saksi, PW14, memberi keterangan bahawa beliau melihat perayu keluar dari bilik si mati sekitar jam 10.20 malam. Di bawah keadaan tersebut, teori 'terakhir dilihat bersama' terpakai dan beban beralih kepada perayu untuk mengemukakan penjelasan yang kukuh dan kuat untuk menyangkal anggapan bahawa tindakannya telah menyebabkan kematian si mati. Ketiadaan penjelasan sedemikian memudaratkan pembelaan (lihat perenggan 51–52 & 54).

(4) Hakim bicara mendapati versi peristiwa perayu tidak lebih daripada

penafian kosong yang tidak mampu menimbulkan keraguan munasabah dalam kes pendakwaan. Dalam membuat keputusan tersebut, hakim perbicaraan memberi pertimbangan sewajarnya kepada fakta bahawa pihak pembelaan tidak pernah membangkitkan isu bahawa kepala si mati sebenarnya terhantuk pada dinding papan kalsium lembut semasa kes pendakwaan. Isu ini hanya dibangkitkan apabila pembelaan dipanggil. Ini menjejaskan kredibiliti perayu kerana garis pembelaan penting ini tidak pernah dikemukakan kepada mana-mana saksi pendakwaan (lihat perenggan 55 & 57).

(5) Pembelaan perayu pada asasnya adalah pemikiran semula dan penafian kosong tanpa sebarang kredibiliti. Keputusan dan dapatan yang dibuat oleh hakim bicara pada akhir perbicaraan adalah tidak jelas salah (lihat perenggan 56 & 59).]

Cases referred to

Ashok v State of Maharashtra [2015] 4 SC 393, SC (refd)
Kanhaiya Lal v State of Rajasthan [2014] 4 SCC 715, SC (refd)
Mohd Ya'cob bin Demyati lwn Pendakwa Raya [2011] 2 MLJ 321; [2011] 4 CLJ 758, CA (refd)
Nika Ram v State of Himachal Pradesh [1972] 2 SCC 80, SC (refd)
Pubalan a/l Peremal v PP [2020] 5 MLJ 442; [2020] 8 CLJ 306, FC (refd)
Public Prosecutor v Ling Tee Huah [1982] 2 MLJ 324 (folld)
Sim Yew Thong v Ng Loy Nam Thomas and other appeals [2000] 4 SLR 193, HC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Penal Code ss 299, 300, 300(a), (b), (c), (d), 302

Appeal from: Criminal Case No BTU-45B-1/4 of 2017 (High Court, Bintulu)

Stephen Augustine Lateng (Lateng Advocates) for the appellant.
Eyu Ghim Siang (Attorney General's Chambers) for the respondent.

Gunalan Muniandy JCA:

THE CHARGE

[1] The charge against the accused reads as follows:

That you on 27 November 2016 at about 8.00 pm until 28 November, 2016 at about 6.00 am, in the Room No 2, second floor, 2H Cafe, Parkcity, Jalan Tun Ahmad Zaidi, in the district of Bintulu, did commit murder by causing the death of NORA ak JELINANG (KPT: 840331-13-6120) and you thereby committed an

offence punishable under Section 302 Penal Code.

INTRODUCTION

[2] The appellant was found guilty of murder as per the above charge and convicted on 26 September 2018. As the offence of murder was punishable under s 302 of the Penal Code ('s 302 of the PC'), he was sentenced to the only sentence permissible in law, ie, death by hanging.

BRIEF FACTS

[3] The deceased rented a room located at second floor of a building at Parkcity, Bintulu. On 27 November 2016 at about 6pm, the deceased and her friend by the name of Teresa ak Enyok ('PW17') went back to the deceased's room after work on the said day.

[4] At around 7.30pm, PW17 heard the deceased talking with a person on the telephone who she believed was the deceased's boyfriend, the accused. Then, she heard the deceased utter vulgar words while talking on the telephone. PW17 suspected that the deceased quarrelled with his boyfriend.

[5] At around 8pm, the accused arrived at the deceased's room. After the deceased opened the door to let the accused in, the accused kept questioning the deceased as to why she did not reply his text messages while holding both of the deceased's shoulders. The deceased did not answer and she tried to stop the accused from continuing to hold her shoulders. The accused then held the back of the deceased's hair and asked the deceased whether she had affairs with other men behind his back. The deceased still did not answer and she further tried to stop the accused from continuing to hold the back of her hair.

[6] Then, PW17 persuaded the deceased to tell the truth to the accused as he went out of control while repeatedly questioning the deceased about the same thing until finally the deceased admitted that she had an affair with another man behind his back. This caused great anger to the accused and he became more aggressive and he repeatedly slapped the deceased's left and right cheeks with no mercy. PW17 tried to stop the accused but when the deceased ran towards PW17, the accused person pulled the deceased's hand until she fell down.

[7] The deceased was enduring great pain due to the assault by the accused. Then, the deceased and PW17 tried to run towards the door to escape but the accused again held the deceased and pushed her towards the concrete wall inside the room whereby the back of deceased's head collided with the concrete

wall until she fell down. The accused again held the deceased and pulled her to the middle of the room and kicked the deceased's foot many times.

[8] PW17 then screamed at the accused for his mercy but the accused person remained aggressive and angry. The accused also kicked PW17's left arm when she tried to shield the deceased from further harm by the accused. At around 9pm, the accused stopped assaulting the deceased but he still kept on scolding the deceased. During that time, the deceased was in great pain and she kept on crying. PW17 then decided to leave them together as she felt that everything was already under control. When she left the deceased, she was still with the accused.

[9] On 28 November 2016, at around 6.35am, while PW17 was in her rented house located at Tanjung Batu, she received a phone call from a man whom she believed, was the accused using the deceased's handphone, telling her that the deceased had already died. After a few minutes, the accused picked up PW17 from her house and PW17 also told the accused to pick up her friend by the name of Emparie ak Unjie (PW16) from his house before going to the deceased's place.

[10] After reaching the said deceased's room, they went to the deceased's room and PW17 saw the deceased lying down on the floor and she only wore bra and panties. Her short dress was seen at her legs. During that time, PW17 asked the accused, a few times what they are supposed to do but the accused kept quiet. Then PW16 took the initiative to call the police for further action.

[11] PW10, the pathologist who did the autopsy on the deceased's body confirmed that the deceased died due to head injury caused by blunt trauma. There were also other multiple external injuries that were found scattered on the deceased's body and they were consistent with the evidence by PW17 who had witnessed how the accused had beaten the deceased repeatedly and violently with no mercy. The injury on the deceased's head is the cause of death of the deceased and it is consistent with the situation when the deceased's head collided with a hard object like concrete wall after being pushed to the wall by the accused. It was also PW10's opinion that the deceased's head injury is sufficient in the ordinary course of nature to cause death. Other injuries suffered by the deceased in PW10's opinion were not fatal in nature as they did not cause serious injuries to internal structures or deceased's organs. Therefore, it was PW10's opinion that the cause of death of the deceased was head injury due to a blunt force trauma.

[12] The accused elected to give sworn evidence in his defence. The accused admitted being at the deceased's rented room on the night of 27 November 2016 at 7pm. A misunderstanding between the accused and deceased arose

because the deceased did not answer his phone calls. He admitted slapping her on her left cheek. Then there was pushing and pulling between him and the deceased and he chased after her and tried to seize and stop her. In the process of trying to avoid him, the deceased knocked herself on the table.

[13] After that the accused asked her to sit down and he admitted pinching and slapping her on her hand and legs. PW17 tried to stop him and the misunderstanding cooled down. He said that the action of pushing and pulling and the misunderstanding between him and deceased went on for about half an hour before it stopped at about 9.30pm.

[14] Then the accused laid down the folded mattress and he and the deceased lay down together. The accused then asked if the deceased was okay or not and she answered she was okay. The deceased then told the accused to go home as she was afraid that the accused's wife will look for him.

[15] The next early morning, the accused tried to call her but there was no answer. Since there was no answer, the accused went to the deceased's rented room.

[16] Since there was no answer from the deceased, the accused tried to open the door, using a test pen. After he managed to open the door, he immediately switched on the light. He was shocked to find deceased's condition where she was lying down on the floor without wearing pants and shirt. He tried to wake her up but there was no response. He then tried to administer CPR on her and checked for her pulse on her wrist and chest, there was no pulse. Then he cried and was scared and looked for her phone to contact PW17. He could not reach PW17, so he went to PW17's rented house at Tanjung Batu and told her that the deceased had passed away.

[17] The accused stated that he had no intention to kill the deceased when he pushed her towards the concrete wall inside the room. Further, the wall on which the deceased's head was banged is made of calcium board which is easily broken and the death of the deceased was not caused by him.

[18] The learned High Court judge ('LJ') found that the accused failed to raise a reasonable doubt in the prosecution case for murder under s 302 of the Penal Code. The LJ, therefore, found the accused guilty of murder punishable under s 302 of the Penal Code and sentenced the accused to death by hanging.

OUR DECISION

[19] We agree with the appellant that in the context of the particular facts of the present case, the essential ingredients of the offence under s 302 of the Penal

Code which the prosecution in this case must establish are as follows:

(a) the death of NORA AK JELINANG (kpt: 840331–13–6120) ('the deceased);

(b) that the deceased died as a result of injuries suffered by her;

(c) that the deceased's injuries were caused by the appellant; and

(d) that in inflicting the injuries upon the deceased, the appellant's act fell within any of the four limbs laid down in s 300(a)–(d) of the PC.

[20] We were urged to give due consideration to the appellant's testimony that he had no intention to kill the deceased when he pushed her towards the wall inside the room which was made of calcium board and easily breakable when some degree of force is applied.

[21] The grounds of the appellant's dissatisfaction with the learned judge's finding and conviction are well summarised in his submission is that the LJ had erred in law and/or in fact in arriving at his decision in the following respects:

(a) when finding that the prosecution had established a prima facie case against the accused;

(b) when finding that the prosecution had established mens rea of the appellant to cause death to the deceased;

(c) when finding that the prosecution had established actus reus of the appellant that cause death to the deceased;

(d) when failing to place reliance on the accused's case at the close of the prosecution's case that the evidence tendered by the prosecution was insufficient to link the accused in any material manner to the elements of the offence and charge;

(e) misdirected himself in law and/or in fact in handling the defence duly put forward by the appellant;

(f) misdirected himself in law and/or in fact in handling that the prosecution had established their case beyond reasonable doubt;

(g) did not properly and adequately assess the petitioner's evidence in the light of the prosecution's evidence; and

(h) in failing to adequately consider the fact that the witnesses offered by the prosecution were without details, contact number, address and etc to enable the defence to trace and make contact and/or that there were available witnesses that should to be called but never been offered by the

prosecution to the appellant that caused material gap in the prosecution's case when the prosecution failed to call the other witnesses present.

Lastly, that the LJ had erred in that he ought to have given and/or failed to give the benefit of doubt to the petitioner.

[22] It would be seen that the thrust of the appellant's defence was that during the incident prior to the deceased's death he had no intention to kill or to cause injuries to her that eventually caused her death.

[23] Of foremost importance for our deliberation on whether the act of the appellant under the present facts and circumstances amounts to murder, the provisions of the Penal Code as follows are crucial:

Section 299 states that:

Whoever cause death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 300 states that:

Except in the cases hereinafter excepted culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[24] For an offence of murder to be established, both the mens rea and actus reus elements are necessary components. We agree with the appellant's proposition that s 299 of the PC in brief defines the offence of culpable homicide whilst s 300 provides that murder is a type of culpable homicide, with death being the only punishment if found guilty of murder. Be it for murder or some other form of culpable homicide, the actus reus is causing the death of a human being.

[25] Likewise, that from a plain reading of s 302, it is silent on the specific

intention requirement which is covered by the situations laid down in s 300 of the PC.

[26] The primary issue in regard to proof of the offence charged was whether the mens rea of the appellant could be inferred and whether he could be inferred to have had the intention to kill the deceased under the circumstances that occurred preceding her death.

[27] What was essentially in dispute before the trial judge was the issue in regard to the third ingredient which the LJ aptly stated to be whether the accused (appellant) who had caused bodily injuries to the deceased had the intention to kill her.

[28] It is trite law that intention, being a mental element, may be proved by recourse to circumstantial evidence and inference from surrounding circumstances and the acts or conduct of the person causing the injuries. A person would be deemed to intend the natural consequences of his act (see *Sim Yew Thong v Ng Loy Nam Thomas and other appeals* [2000] 4 SLR 193 at p 194).

[29] Foremost among the grounds raised by the appellant in the petition of appeal was that he had no intention to kill the deceased and the wall against which the deceased collided on being hit by the appellant was not a concrete wall which created a doubt as to whether the fatal injuries were actually caused by him. The appellant, in evidence, however admitted that he had hit the deceased but maintained that the injuries that he had caused were not fatal or that the injuries had led to her death.

[30] The LJ was not convinced by the appellant's version on the issue of intention but, instead, found in favour of the respondent as follows:

> Thus, from the violent, relentless and aggressive assault on the deceased by the accused person which resulted in the deceased suffering numerous injuries, this court finds that the accused person had the intention to kill the deceased. The multiple injuries all over the deceased's body also showed that the accused beat the deceased violently and repeatedly with no mercy.

[31] In coming to this conclusion, the LJ relied, amongst others, on the report by the pathologist, PW10. The report, in particular, confirmed that the death was caused by blunt trauma to the head but there were also multiple external injuries scattered all over the deceased's body. In the LJ's view this independent evidence was consistent with the testimony given by PW17 who had witnessed the appellant beat the deceased relentlessly and mercilessly.

[32] We were urged by the respondent to hold that the LJ had not fallen into error in arriving at his conclusion as the element of intention obviously is not amenable to proof by direct evidence but may be proved by inference from the surrounding facts which were in abundance as to the appellant's intention.

[33] In the LJ's finding, intention to kill on the appellant's part was an irresistible inference bearing in mind the extensive injuries inflicted on the deceased.

[34] Our attention was drawn to the local classic case on this area of the law, *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, where the court held that:

> The deliberate use by some men of dangerous weapon at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

[35] Importantly too, the court went to further hold that:

> ... Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is likely to result, it is culpable homicide. If it is the most probable result, it is murder.

[36] As rightly pointed out to us by the appellant, in the particular circumstances of this case, the important question to be determined was whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such that are sufficient in the ordinary course of nature to cause death.

[37] On the question of intention to cause bodily injury of the kind that would amount to murder under s 300 of the PC, it would be instructive to make reference to the Federal Court decision in *Pubalan a/l Peremal v Public Prosecutor* [2020] 5 MLJ 442; [2020] 8 CLJ 306, where it was observed, inter alia, that:

> [15] In cases of personal violence resulting in death it is necessary for the trial judge to have directed his mind on the issue of degree of mens rea in the mind of the appellant. Whilst intention is a matter of inference, in actual practice it is frequently a matter of considerable difficulty to come at a conclusion by application of this principle because of the close proximity that the Penal Code makes between intention and knowledge. Admittedly, in the first place, the provisions relating to murder and culpable homicide are very technical. Apart from the distinction between intention and knowledge, the Penal Code also draws subtle distinctions between the degrees of intention to inflict bodily injury.

[38] Reference was made by the Federal Court to *Tham Kai Yau v Public Prosecutor* where it was remarked that:

> We take this occasion to stress in passing that the outcome of a prosecution on a charge for murder does not turn solely on the testimony of the forensic pathologist. The forensic pathologist does not carry the burden of the case. His testimony is a factual and objective presentation of his autopsy findings and his opinions on the correlation of the autopsy findings with other case information. Even though he is called by the prosecution to testify, he is first and foremost an expert witness who should be impartial, objective and independent. In the final analysis, whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, are questions which should have been asked of the forensic pathologist by the learned DPP during the trial.

[39] It was the crux of the appellant's defence that at the material time he never had any intention to kill the deceased notwithstanding that during the incident he had inflicted several bodily injuries on the deceased. His version was that the death was accidental as it was caused solely by the deceased colliding into the wall, which was her own accidental act. There was no question of the any harm being intended by him when he hit the deceased on that fateful night.

[40] In our view, the LJ had duly given emphasis and weight to the uncontradicted evidence of PW17, who was at the scene and the sole eye witness, and testified that she saw the appellant hit the deceased aggressively and also saw the appellant push the deceased to the wall in the course of the prolonged and relentless attack on her.

[41] We concur with the contention of the respondent that the evidence of PW17 was corroborated by the evidence of PW10 that the cause of death of the deceased is head injury due to blunt force trauma. During the visit to the scene, PW10 also noticed that the concrete wall can be considered as a blunt and hard object.

[42] More importantly, from a scrutiny of the evidence and surrounding facts as a whole, it was abundantly clear, as taken cognisance of by the LJ, that the appellant's act of pushing the deceased to the concrete wall which was the culmination of the series of beatings inflicted on her was the ultimate cause of her death. As contended by the respondent, the material facts relating to this incident were never challenged by the appellant. There was no intervening cause after the attack by the appellant prior to the deceased being discovered dead.

[43] PW10's evidence that the wall at the scene was a hard, blunt object sufficient to cause fatal injuries to the head upon forceful impact negated the appellant's defence that the impact to the head was only to a soft wall and, thus, could not be intended to cause such bodily injuries that would in the natural course result in the deceased's death.

[44] While PW10's expert opinion based on the post mortem ('PM') examination was that the deceased's cause of death was head injury due to blunt force trauma, PW10 had also found on external examination not less than 26 external marks of injuries as a result of blunt force trauma. There were also several injuries found in the internal parts of the head, mouth and neck. Hence, there was obviously a multitude of injuries inflicted on the deceased during the incessant attack by the appellant culminating in the trauma to the head with considerable force. All these findings the LJ had duly and carefully taken into consideration before making his finding on the core issue of intention.

[45] From a consideration of the entire evidence, the LJ was satisfied that there was clear and sufficient evidence to prove that the appellant (accused) had the intention to kill the deceased on that fateful night. He concluded that:

> ... It can be safely inferred from the accused person's relentless, aggressive and violent assault toward the deceased which lasted for a least one hour. PW17 testified that the accused person met the deceased at about 6pm the day in question and not long after that, he started assaulting the deceased until PW17 left the deceased and the accused person at about 9pm when PW17 thought that it was safe for her, to leave the two of them.

[46] The LJ, in our view, stated the law correctly that to establish a case of murder, motive is not an element which must be proven. However, although motive is not a necessary ingredient to be established in the offence of murder, it would if shown to exist lend support to the case against the accused so charged.

[47] In the LJ's finding, an irresistible inference can be drawn that the appellant had a motive to kill the deceased due to intense jealousy over the deceased's affair with another man behind his back. It was demonstrated by the kind and extent of the beating of the deceased when she admitted to the affair. In the Court of Appeal the case of *Mohd Ya'cob bin Demyati lwn Pendakwa Raya* [2011] 2 MLJ 321; [2011] 4 CLJ 758, the court had, inter alia, observed that:

> ... To establish a case of murder, motive is not an element which must be proven. However, although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against the accused so charged (see *Dato' Moktar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, Per Abdoolcadir FJ, and *Parimal v*

State [1986] Cr LJ 220, at p 227). Such a motive was established in the instant appeal.

[48] In impressing upon us that the vital element of intention on the appellant's part, which was the thrust of his defence, had not been fulfilled, the appellant highlighted to us that none of the prosecution witnesses could satisfactorily testify that the appellant was actuated by an intention to kill the deceased. As we have alluded to, intention being a mental element, could rarely be proved by direct evidence from witnesses. Proof of the requisite intention to kill or cause such bodily injury that would in the ordinary course cause death may be by indirect or circumstantial evidence from which an inference can be safely made of the accused's intention if the surrounding facts and circumstances are strong enough to warrant the said inference being made against the accused.

[49] In regard to the central question in this appeal as to whether the finding of the LJ that the appellant had caused bodily injuries to the deceased with the requisite intention to cause her death was plainly wrong, the determining question was whether during the incident at the deceased's place, the appellant, as submitted on his behalf, did not have any intention to cause such injury that would ordinarily cause her death. It was premised on the alleged fact that the appellant merely pushed the deceased until she fell down and her head hit the wall and he had at no time deliberately banged her head directly and forcefully against the wall. In other words, that the incident of the head hitting the wall was purely accidental and not intended.

[50] From a careful consideration of all the facts and evidence before the trial court, as sufficiently and properly taken cognisance of by the LJ, we are, with respect, unable to accede to the proposition as above by the appellant's counsel before us.

[51] We are inclined to agree with the respondent that the 'last seen together' doctrine lends support to the LJ's finding that the appellant had failed to proffer an explanation for the fatal injuries, including the head injury suffered by the deceased that led to her death.

[52] Another important point was also advanced before us by the respondent concerning the principle of the last person having been seen together with the deceased before she was discovered dead. PW17, the sole eye-witness to the incident, who was accepted by the LJ to be a credible and truthful witness testified that the appellant was with the deceased when she left the room after the incident when the commotion stopped. Another witness, PW14, testified that she saw the appellant leave the deceased's room around 10.20pm.

[53] Our attention was drawn to the Indian Supreme Court decision of *Ashok v State of Maharashtra* [2015] 4 SC 393 where the Supreme Court of India held that:

> The 'last seen together' theory has been elucidated by this court in *Trimukh Marotiu Kirkan v State of Maharashtra* [2006] 10 SCC 106, in the following words:
>
> > Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer an explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

[54] Under the circumstances of this case where, in our view, the 'last seen together' theory applies, the burden shifted to the appellant to proffer a strong and cogent explanation and rebut the presumption that his act or series of acts led to the deceased's death and the inference that he committed the acts. The absence of such an explanation would be detrimental to his defence (see *Nika Ram v State of Himachal Pradesh* [1972] 2 SCC 80; *Kanhaiya Lal v State of Rajasthan* [2014] 4 SCC 715).

[55] Having properly and carefully considered the sworn testimony given by the appellant in his defence together with the testimonies of the prosecution witnesses, the LJ concluded that the appellant's version was no more than a bare denial that was incapable of raising a reasonable doubt in the prosecution case considering that on credible evidence he had admittedly inflicted grave injuries on the deceased and was the last person seen with the deceased on that fateful night. The LJ had rightly evaluated and given weight to the credibility of the appellant compared to that of the vital prosecution eye-witness, PW17, whose testimony he preferred over the appellant's testimony as it was, in all respects, consistent and credible. Additionally, she was an independent and uninterested witness, which, to our minds, is a correct finding.

[56] We are on common ground with the LJ that a bare denial in the face of cogent and credible evidence produced by the prosecution is not a good defence and guidance can be sought from *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324, where the court held that:

> ... A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient. A magistrate is, of course, entitled to believe a witness at a trial but a general references to the demeanour of witnesses without more, gives

rise to suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of the evidence but to the probabilities and which could not be supported on a detailed examination of the evidence. See *R v Low Toh Cheng* [1941] 1 MLJ 1.

[57] Amongst others, the LJ, in finding that the appellant had failed to raise any reasonable doubt, gave due weight to the fact that the defence never raised the issue that the deceased's head was actually banged against the wall which is made of calcium board when the Prosecution's witnesses gave their testimonies at the prosecution stage in court. This issue was only raised when the defence was called. In his view, this jeopardised his credibility as this important line of defence was never put to any of the prosecution witnesses. This view is clearly in line with correct principles on the issue at hand.

[58] Likewise, the LJ found that the appellant's defence was essentially an afterthought that ought to be rejected. His version, in view of vital evidence given by PW17, particularly, that the appellant's attack on the deceased was very brutal and relentless that was supported by the numerous grave injuries sustained by her, was incredible and unreasonable. In gist, his version was that he had merely touched her private area but did not do anything bad. Then, after he had calmed down, both of them lay down together on the bed when he asked about her condition to which she replied that she was alright. We agree with the LJ that this was a bare defence devoid of any credibility in view of the state of the said injuries and the fact that the appellant left the scene without any regard for the deceased for whom urgent medical attention was needed.

CONCLUSION

[59] In our judgment, the decision and finding of LJ at the conclusion of the trial which we reproduce below was not demonstrated to us to be erroneous on the facts and evidence as a whole and more importantly plainly wrong:

> Having evaluated the defence of the accused person, re-evaluated the prosecution's evidence in the light of the accused person's defence, and applying the relevant law and principles, this court does not accept or believe the said defences raised by the accused person and also finds that the accused person's defence has not raised in the mind of this court, a reasonable doubt as to the guilt of the accused person.

[60] In the circumstances and for the reasons aforesaid, we are inclined to conclude that, based on the grounds of appeal and established principles of law applicable to criminal trials, this appeal is wholly devoid of merits and accordingly, the decision of the High Court is affirmed, including the only sentence known to law for offence of murder, namely, the death sentence.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar